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EPA--REGION 10

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

IN THE MATTER OF:

ASARCO SMELTER AND OFF-SHORE SEDIMENTS
OF THE COMMENCEMENT BAY NEARSHORE/
TIDEFLATS SUPERFUND SITE

ASARCO INCORPORATED,
Tacoma, WA Facility

RESPONDENT

Proceeding Under Sections 104, 122(a),
and 122(d)(3) of the Comprehensive
Environmental Response, Compensation,
and Liability Act as amended
(42 U.S.C §§ 9604, 9622(a),
9622(d)(3)).

ADMINISTRATIVE ORDER
ON CONSENT FOR
GROUND WATER, SURFACE
WATER, SOIL AND MARINE
SEDIMENTS MONITORING
AND SAMPLING

OPERABLE UNITS 02 & 06

Docket No. 10-94-0221

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ASARCO SMELTER/MARINE SEDIMENTS -- Page 1

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I. INTRODUCTION

1. This Administrative Order on Consent (Consent Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA) and ASARCO Incorporated (Asarco or Respondent). The Consent Order concerns the preparation of, performance of, and reimbursement for all costs incurred by EPA in connection with monitoring or sampling ground water, surface water, and soil at the former Asarco smelter and sampling marine sediments off-shore from the former Asarco smelter. The former Asarco smelter is Operable Unit 02 ("the Smelter Site") and the marine sediments are Operable Unit 06 (the Sediments Unit") of the Commencement Bay Nearshore/Tideflats Superfund Site, located in Tacoma, Washington.

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3. Respondent agrees to undertake all actions required by the terms and conditions of this Consent Order. In any action by EPA or the United States to enforce the terms of this Consent Order, Respondent consents to and agrees not to contest the authority or jurisdiction of EPA to issue or enforce this Consent Order, and agrees not to contest the validity of this Consent Order or its terms.

4. This Consent Order shall apply to and be binding upon EPA and shall be binding upon Respondent, its agents, successors, and assigns. Respondent is responsible for carrying out all actions required of it by this Consent Order. The signatory for Respondent certifies that he/she is authorized to execute, and legally bind Respondent to, this Consent Order. No change in the ownership or corporate status of Respondent or of the facility or Site shall

1 alter Respondent's responsibilities under this Consent Order.

2 5. Respondent shall provide a copy of this Consent Order to
3 any subsequent owners or successors. Respondent shall provide a
4 copy of this Consent Order to all contractors, subcontractors,
5 laboratories, and consultants which are retained to conduct any
6 Work performed under this Consent Order, within fifteen (15) days
7 after the effective date of this Consent Order or the date of
8 retaining their services, whichever is later. Respondent shall
9 condition any such contracts upon satisfactory compliance with this
10 Consent Order. Notwithstanding the terms of any contract,
11 Respondent is responsible for compliance with this Consent Order
12 and for ensuring that its subsidiaries, employees, contractors,
13 consultants, subcontractors, agents and attorneys comply with this
14 Consent Order.

15 IV. STATEMENT OF PURPOSE

16 6. In entering into this Consent Order, the objectives of EPA
17 and Respondent are: (a) to determine the nature and extent of
18 contamination and any threat to the public health, welfare, or the
19 environment caused by the release or threatened release of
20 hazardous substances, pollutants or contaminants in ground water,
21 surface water, and soil at the former Asarco smelter and in marine
22 sediments off-shore from the former Asarco smelter; (b) to
23 determine and evaluate alternatives for remedial action (if any) to
24 prevent, mitigate or otherwise respond to or remedy any release or
25 threatened release of hazardous substances, pollutants, or
26 contaminants in the marine sediments; and (c) to have Respondent

1 reimburse EPA for all oversight costs incurred by EPA with respect
2 to this Consent Order.

3 7. The activities conducted by Respondent under this Consent
4 Order (the "Work") are subject to approval by EPA, and Respondent
5 shall provide all information required by the attached appendices:

6 (a) Appendix I: "Statement Of Work, Asarco Sediments Site"
7 ("Sediments SOW").¹

8 (b) Appendix II: "Post-RI, Long-Term Monitoring Sampling and
9 Analysis Plan," March 1994 ("Monitoring Plan").

10 Appendix II has been reviewed and approved by EPA. The activities
11 conducted by Respondent under this Consent Order shall be conducted
12 in compliance with all applicable EPA guidances, policies, and
13 procedures in existence at the time of entry of this Consent Order.

14 8. In entering into this Consent Order, Respondent denies any
15 and all legal and equitable liability under any federal, state,
16 local or tribal statute, regulation, or common law for any
17 endangerment, nuisance, response, removal or remedial costs
18 incurred or to be incurred by the United States, the State of
19 Washington, or other person as a result of the release or threat of
20 release of hazardous substances to, at, from or near the former
21 Smelter Site or Sediments Unit. This Consent Order is not
22 acknowledgment by Respondent that any release or threatened release
23 of a hazardous substance constituting an imminent and substantial
24

25 ¹ For purposes of this Consent Order, references to the
26 Sediments SOW includes Work Plans and other documents that are
27 required to be prepared under the Sediments SOW.

1 endangerment to human health or the environment has occurred or
2 exists at the Site. Respondent does not admit, and retains the
3 right to controvert any of the factual or legal statements or
4 determinations made in this Consent Order or its appendices in any
5 judicial or administrative proceeding, except an action to enforce
6 this Consent Order. This Consent Order shall not be admissible in
7 any judicial or administrative proceeding as proof of liability or
8 an admission of any fact dealt with herein, but it shall be
9 admissible in an action to enforce this Consent Order.

10 V. FINDINGS OF FACT

11 9. The Commencement Bay Nearshore/Tideflats Superfund Site
12 (Commencement Bay Site) is located in Tacoma, Washington at the
13 southern end of the main basin of Puget Sound. The Commencement
14 Bay Site encompasses an active commercial seaport and includes
15 approximately 10-12 square miles of shallow water, shoreline and
16 adjacent land, most of which is highly developed and
17 industrialized. The former Asarco smelter is located within the
18 Commencement Bay Site.

19 10. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA
20 placed the Commencement Bay Site on the National Priorities List,
21 set forth at 40 C.F.R. Part 300, Appendix B, by publication in the
22 Federal Register on September 8, 1983, 48 Fed. Reg. 40,658.

23 11. Because of the complexity of the Commencement Bay Site,
24 response actions at the Site are currently coordinated under seven
25 separate operable units managed primarily by EPA and the Washington
26 State Department of Ecology (Ecology), including: (i) Operable

1 Unit 01 -- Commencement Bay Sediments; (ii) Operable Unit 02 --
2 Asarco Tacoma Smelter; (iii) Operable Unit 03 -- Tacoma Tar Pits;
3 (iv) Operable Unit 04 -- Asarco Off-Property; (v) Operable Unit 05
4 -- Commencement Bay Sources; (vi) Operable Unit 06 -- Asarco
5 Sediments; and (vii) Operable Unit 07 -- Asarco Smelter Demolition.
6 This Consent Order involves Operable Units 02 and 06, together
7 called the "Site" for purposes of this Consent Order.

8 12. Respondent is a New Jersey corporation that presently
9 owns the site of the former Asarco Tacoma smelter. The smelter is
10 located along the shoreline of Commencement Bay, near the southern
11 end of Puget Sound in the State of Washington (the State). The
12 smelter began operating in 1890 as a lead smelter. The American
13 Smelting and Refining Company purchased the smelter in 1905 and
14 converted it to a copper smelter in 1911 (American Smelting and
15 Refining Company changed its name to ASARCO Incorporated in 1975).
16 Respondent ceased operating the smelter in 1985. Past operations
17 and emissions resulted in releases of hazardous substances from the
18 Asarco smelter. Respondent is liable both as the current owner and
19 the former operator of the smelter for the releases of hazardous
20 substances at the Site. The State of Washington is the owner of
21 tidelands located in Operable Unit 06.

22 13. Pursuant to an Administrative Order on Consent dated
23 September 1986 (1986 AOC), Respondent agreed to perform immediate
24 stabilization activities at the Site and to conduct a remedial
25 investigation/feasibility study (RI/FS) of the Asarco smelter to
26 determine the nature and extent of contamination and to evaluate

1 alternatives for cleanup of the Asarco smelter. Respondent
2 submitted a final RI in January 1993 and a final FS in August 1993.

3 14. Pursuant to an Interim Remedial Action Consent Decree
4 entered in May 1992, Respondent agreed to demolish the majority of
5 the structures on the Smelter Site and to undertake interim surface
6 water management measures. The demolition of the majority of the
7 structures is expected to be completed by the end of 1994. A
8 Record of Decision for further remedial actions at the Site is
9 expected to be issued in 1995.

10 15. The primary contaminants of concern that were released
11 into the environment at the former Asarco smelter and in the marine
12 sediments include arsenic, cadmium, copper, lead, mercury, and
13 zinc. These contaminants are known to be toxic to humans and
14 marine life and are hazardous substances within the meaning of
15 Section 101(14) of CERCLA, 42 U.S.C. § 9601(14). Residual
16 contamination exists in soil, surface water, and ground water at
17 the former Asarco smelter. Marine sediments off-shore from the
18 former Asarco smelter appear to have been impacted by this residual
19 contamination.

20 16. In addition to the aquatic and biological investigation
21 work required by the 1986 AOC, Respondent also voluntarily
22 conducted later sampling activities in the marine sediments off-
23 shore from the Asarco smelter. Based in part on the information
24 provided by Respondent, EPA issued a Supplemental Feasibility Study
25 in October 1993.

1 VI. CONCLUSIONS OF LAW AND DETERMINATIONS

2 17. The former Asarco smelter is a "facility" as defined in
3 section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4 18. Wastes and constituents thereof at the Smelter Site and
5 Sediments Unit identified in Paragraph 15 are "hazardous
6 substances" or constitute any "pollutant or contaminant" as
7 described in section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1).

8 19. The presence of hazardous substances at the Smelter Site
9 or the past, present or potential migration of hazardous substances
10 currently located at or emanating from the Smelter Site, constitute
11 actual and/or threatened "releases" as defined in section 101(22)
12 of CERCLA, 42 U.S.C. § 9601(22).

13 20. Respondent is a "person" as defined in section 101(21) of
14 CERCLA, 42 U.S.C. § 9601(21).

15 21. Respondent is a responsible party under sections 104, 107
16 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622.

17 22. The actions required by this Consent Order are necessary
18 to protect the public health or welfare or the environment, are in
19 the public interest, are consistent with CERCLA and the National
20 Contingency Plan (NCP), and will expedite effective remedial action
21 and minimize litigation.

22 VII. NOTICE

23 23. By providing a copy of this Consent Order to the State,
24 EPA is notifying the State of Washington that this Consent Order is
25 being issued and that EPA is the lead agency for coordinating,
26 overseeing, and enforcing the monitoring activities required by the

1 Consent Order.

2 VIII. WORK TO BE PERFORMED

3 24. EPA has determined that additional information regarding
4 the marine sediments in the vicinity of the former Asarco smelter
5 needs to be collected and evaluated before cleanup alternatives can
6 be proposed and selected. The additional information includes the
7 following:

8 (a) Whether all contaminated areas have been identified,
9 including an area within the Yacht Club basin and areas
10 immediately north and south of the Smelter Site.

11 (b) Whether areas of sediments with large amounts of slag
12 pose a threat to human health and the environment.

13 (c) Whether sediments will be recontaminated if there are
14 continuing releases of ground water or surface water from
15 the Smelter Site.

16 (d) Whether it is feasible to cap and/or dredge affected
17 sediments in steeply sloped or deep areas of Commencement
18 Bay.

19 Further information objectives are described in the Sediments SOW
20 (Appendix I).

21 25. EPA also believes that it is necessary to continue
22 monitoring or sampling ground water, surface water, and soil to
23 provide both a better assessment of ground-water, surface water,
24 and soil conditions and an evaluation of the effectiveness of soil
25 and surface water cleanup actions on ground water and surface water
26 quality. Based on this additional information, EPA will determine

1 whether further actions with respect to ground water and surface
2 water are necessary and, if so, propose and select the appropriate
3 cleanup remedies from among feasible alternatives. EPA has
4 determined that the additional information that needs to be
5 collected and evaluated includes the following:

- 6 (a) Impacts of source control on ground-water quality.
- 7 (b) Extent to which concentrations of contaminants in the
8 ground water are naturally being lowered through chemical
9 reactions currently taking place in the ground water.
- 10 (c) Extent to which dilution by seawater may also be reducing
11 concentrations of contaminants.
- 12 (d) Loadings of contaminants (for example, kilograms per day)
13 discharged to Commencement Bay via ground water pathways.
- 14 (e) Concentrations of contaminants in soil in locations where
15 buildings have recently been demolished.

16 Further information objectives are described in the Monitoring Plan
17 (Appendix II).

18 26. (a) All aspects of the Work performed by Respondent of
19 this Consent Order shall be under the direction and supervision of
20 the Supervising Contractor(s), the principal contractor(s) retained
21 by Asarco to supervise and direct the implementation of the Work.
22 The selection of the Supervising Contractor(s) shall be subject to
23 disapproval by EPA. Within fifteen (15) days after the effective
24 date of this Consent Order, Respondent shall notify EPA in writing
25 of the name, title, and qualification of any contractor(s) proposed
26 to be the Supervising Contractor(s). Information regarding

1 technical or management staff shall be included in the Expanded
2 RI/FS Work Plan as required under Section II.A.2 of the Sediments
3 SOW. EPA will issue a notice of disapproval or an authorization to
4 proceed. If at any time thereafter, Respondent proposes to change
5 a Supervising Contractor, Asarco shall give such notice to EPA and
6 must obtain an authorization to proceed from EPA, before the new
7 Supervising Contractor performs, directs, or supervises any Work
8 under this Consent Order.

9 (b) If EPA disapproves a proposed Supervising Contractor, EPA
10 will notify Respondent in writing. Respondent shall submit a list
11 of contractors, including the qualifications of each contractor,
12 that would be acceptable to it within thirty (30) days of receipt
13 of EPA's disapproval of the contractor previously proposed. EPA
14 will provide written notice of the names of any contractor(s) that
15 it disapproves and an authorization to proceed with respect to any
16 of the other contractors. Respondent may select any contractor
17 from that list that is not disapproved and shall notify EPA of the
18 name of the contractor selected within twenty-one (21) days of
19 EPA's authorization to proceed.

20 (c) If EPA fails to provide written notice of its
21 authorization to proceed or disapproval as provided in this
22 Paragraph and this failure prevents Respondent from meeting one or
23 more deadlines in a plan approved by EPA pursuant to this Consent
24 Order, Respondent may seek relief under the provisions of
25 Section XIX (Force Majeure) hereof.

1 27. (a) Respondent shall conduct activities and submit
2 deliverables as provided by the attached Sediments SOW (Appendix I)
3 and Monitoring Plan (Appendix II), which are incorporated by
4 reference. All such Work shall be conducted in accordance with
5 CERCLA, the NCP, and EPA or other guidances referenced in the
6 Statement of Work, as it may be amended or modified by EPA. The
7 specific activities that Respondent is required to perform are set
8 forth in the Sediments SOW and Monitoring Plan. All Work performed
9 under this Consent Order shall be in accordance with the schedules
10 set forth in Paragraphs 27(b) and (c) herein, and in full
11 accordance with the standards, specifications, and other
12 requirements of the Sediments SOW and the Monitoring Plan, as
13 initially approved or modified by EPA, and as they may be amended
14 or modified by EPA from time to time. For the purposes of this
15 Consent Order, day means calendar day unless otherwise noted in the
16 Consent Order.

17 (b) The schedule for performance of the Sediments SOW is set
18 forth in Section III, Exhibit 1 to the Sediments SOW.

19 (c) The schedule for performance of the Monitoring Plan is as
20 follows:

21 (i) Sampling of ground water and shoreline monitoring
22 stations shall be conducted in June and September
23 in 1994 and in March and September through at least
24 1998.

25 (ii) Unvalidated data from the March sampling shall be
26 submitted to EPA no later than July of that year.

1 Unvalidated data from the September sampling shall
2 be submitted to EPA no later than January of the
3 next year. The penalties identified in
4 Paragraph 61 shall not apply to this subsection.
5 However, pursuant to Paragraph 30, EPA will direct
6 Asarco not to perform further sampling if
7 unvalidated data from a sampling event has not been
8 submitted at least two (2) weeks prior to the start
9 of the next sampling event.

10 (iii) Validated data from the March sampling shall be
11 submitted to EPA no later than September of that
12 year. Validated data from the September sampling
13 shall be submitted to EPA no later than March of
14 the next year.

15 (iv) The frequency of sampling of surface water outfalls
16 is set forth in Section 2.4 of the Monitoring Plan.

17 (v) Reports of surface water sampling shall be
18 submitted each month to EPA no later than thirty
19 (30) days after the end of the previous month.

20 (vi) Sampling of polyaromatic hydrocarbons (PAHs) in on-
21 Site surface water outfalls shall be conducted at
22 least once a month for six (6) months beginning in
23 October 1994. If PAHs are not detected during the
24 first three (3) months of sampling, further
25 sampling for PAHs will be discontinued.

(vii) Results of the additional soil boring sampling identified in Section 3.3 of the Monitoring Plan shall be submitted to EPA no later than three (3) months after they are collected.

28. EPA reserves the right to comment on, modify and direct changes for all deliverables. At EPA's direction, Respondent shall fully correct all deficiencies and incorporate and integrate all information and comments supplied by EPA either in subsequent or resubmitted deliverables, within thirty (30) days after receiving such direction, unless a shorter time is specified by EPA, but in no event less than fourteen (14) days. If Respondent disputes specific EPA comments and modifications or changes, pursuant to Section XVII of this Consent Order, Respondent shall submit a written statement setting forth in detail Respondent's dispute with EPA's requested modifications or changes within fourteen (14) days of receipt of EPA's direction. The parties have fourteen (14) days from EPA's receipt of Respondent's written statement to informally resolve the dispute. If resolution is not reached within the fourteen (14) day informal resolution period, Respondent shall modify or change the subject deliverable, report, plan, or other item in accordance with EPA's direction, or, within seven (7) business days, Respondent shall invoke formal dispute resolution as provided in Section XVII of this Consent Order.

29. Respondent shall not proceed with monitoring or sampling of marine sediments until receiving EPA approval on the Expanded Remedial Investigation/Feasibility Study Work Plan required under

1 the Sediments SOW.

2 30. In the event EPA determines that Respondent has failed to
3 implement any provision of the Work in an adequate or timely
4 manner, EPA may stop Respondent from proceeding further, either
5 temporarily or permanently, on any task, activity or deliverable at
6 any point during the performance of the Sediments SOW and
7 Monitoring Plan and EPA may perform any and all portions of the
8 Work as EPA determines necessary. Respondent may invoke the
9 procedures in Section XVII (Dispute Resolution) to dispute EPA's
10 determination.

11 31. In the event that Respondent amends or revises a report,
12 plan or other submittal upon receipt of EPA comments, if EPA
13 subsequently disapproves of the revised submittal, or if subsequent
14 submittals do not fully reflect EPA's directions for changes, EPA
15 may seek stipulated or statutory penalties; perform its own
16 studies, complete the performance of the Sediments SOW and
17 Monitoring Plan (or any portion of the performance of the Sediments
18 SOW and Monitoring Plan) under CERCLA and the NCP, and seek
19 reimbursement from Respondent for EPA's costs; and/or seek any
20 other appropriate relief.

21 32. Respondent shall, prior to any off-Site shipment of
22 hazardous substances to an out-of-state waste management facility,
23 provide written notification to the appropriate state environmental
24 official in the receiving state and to EPA's Designated Project
25 Coordinator of such shipment of hazardous substances. However, the
26 notification of shipments shall not apply to any such off-Site

1 shipments when the total volume of such shipments will not exceed
2 ten (10) cubic yards.

3 (a) The notification shall be in writing, and shall include
4 the following information, where available:

5 (i) The name and location of the facility to which the
6 hazardous substances are to be shipped;

7 (ii) The type and quantity of the hazardous substances
8 to be shipped;

9 (iii) The expected schedule for the shipment of the
10 hazardous substances; and

11 (iv) The method of transportation.

12 (b) Respondent shall notify the receiving state of major
13 changes in the shipment plan, such as a decision to ship
14 the hazardous substances to another facility within the
15 same state, or to a facility in another state.

16 (c) The identity of the receiving facility and state will be
17 determined by Respondent. Respondent shall provide all
18 relevant information, including information under the
19 categories noted in Paragraph 32(a) above, on the off-
20 Site shipments, as soon as practical before the hazardous
21 substances are actually shipped.

22 IX. MODIFICATION OF THE SEDIMENTS SOW OR MONITORING PLAN

23 33. If at any time during performance of the Sediments SOW or
24 the Monitoring Plan, Respondent identifies a need for additional
25 data, a memorandum documenting the need for additional data shall
26 be submitted to the EPA Project Coordinator within twenty (20) days

1 of identification. EPA in its discretion will determine whether
2 such data may be incorporated into reports and deliverables under
3 this Consent Order.

4 34. In the event of conditions posing an immediate threat to
5 human health or welfare or the environment, Respondent shall notify
6 EPA and the State immediately. In the event of unanticipated or
7 changed circumstances at the Site that significantly affect
8 performance of the Work, Respondent shall notify the EPA Project
9 Coordinator by telephone within twenty-four (24) hours of discovery
10 of the unanticipated or changed circumstances. In addition to the
11 authorities in the NCP, in the event that EPA determines that the
12 immediate threat or the unanticipated or changed circumstances
13 warrant changes in the Sediments SOW or Monitoring Plan, EPA may
14 modify or amend the Sediments SOW or Monitoring Plan. Respondent
15 shall perform the Sediments SOW or Monitoring Plan as modified or
16 amended by EPA.

17 35. EPA may determine that in addition to tasks defined in
18 the initially approved Sediments SOW or Monitoring Plan, other
19 additional Work may be necessary to accomplish the objectives of
20 the Sediments SOW and Monitoring Plan. EPA may require that
21 Respondent perform these response actions in addition to those
22 required by the Sediments SOW and the Monitoring Plan, including
23 any approved modifications, if EPA determines that such actions are
24 necessary to achieve the information objectives. Respondent shall
25 confirm its willingness to perform the additional Work in writing
26 to EPA within seven (7) days of receipt of the EPA request or

Respondent shall invoke dispute resolution. Subject to EPA resolution of any dispute, Respondent shall implement the additional tasks which EPA determines are necessary. The additional Work shall be completed according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the Sediments SOW or Monitoring Plan. In the event that EPA determines that Respondent has failed to implement any provision of the Work in an adequate or timely manner, EPA reserves the right to conduct the Work itself, to seek reimbursement of costs from Respondent, and/or to seek any other appropriate relief.

X. QUALITY ASSURANCE

36. Respondent shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the Sediments SOW, and its associated approved Work Plans, the Post RI Long Term Monitoring Plan, the Quality Assurance Project Plans (QAPjP), and guidances identified therein. Respondent shall assure that field personnel used by Respondent are properly trained in the use of field equipment and in chain of custody procedures.

XI. PROPOSED PLAN, PUBLIC COMMENT,

RECORD OF DECISION, ADMINISTRATIVE RECORD

37. EPA retains the full authority and responsibility for the release to the public of any final reports prepared as a result of the Sediments SOW and Monitoring Plan. EPA retains responsibility for the preparation and release to the public of the Proposed Plan(s) and Record Of Decision(s) regarding ground water, surface

1 water, soil, and marine sediments in accordance with CERCLA and the
2 NCP.

3 38. EPA will determine the contents of the administrative
4 record file for selection of the remedial action(s) for ground
5 water, surface water, soil, and marine sediments in accordance with
6 the requirements of the National Contingency Plan. Respondent
7 shall submit to EPA the deliverables developed during the
8 performance of the Sediments SOW and Monitoring Plan upon which
9 selection of the response action may be based. If requested by
10 EPA, Respondent shall provide copies of plans, task memoranda
11 including documentation of field modifications, recommendations for
12 further action, quality assurance memoranda and audits, raw data,
13 field notes, laboratory analytical reports and other reports. If
14 requested by EPA, Respondent shall submit any previous studies
15 conducted under state, local or other federal authorities relating
16 to selection of the response action.

17 XII. PROGRESS REPORTS AND MEETINGS

18 39. Respondent may participate in meetings at the request of
19 EPA during the initiation, conduct, and completion of the Sediments
20 SOW and Monitoring Plan. In addition to discussion of the
21 technical aspects of the monitoring programs, topics may include
22 anticipated problems or new issues. Meetings may be scheduled at
23 EPA's discretion.

24 40. In addition to the deliverables set forth in this Consent
25 Order, Respondent shall provide to EPA monthly progress reports by
26 the tenth (10) day of the following month with respect to the

1 Sediments SOW. The required contents of the monthly progress
2 reports are set forth in Section II.A.2.b of the Sediments SOW.

3 XIII. SAMPLING, ACCESS, AND DATA AVAILABILITY/ADMISSIBILITY

4 41. Tabular summaries of all results of sampling, tests,
5 modeling or other data generated by Respondent, or on Respondent's
6 behalf, during implementation of this Consent Order, shall be
7 submitted to EPA as set forth in Paragraphs 27(c) and 40 of this
8 Consent Order or as requested by EPA. All validated data and all
9 laboratory analytical reports shall be submitted by Respondent to
10 EPA as set forth in Section III, Exhibit 1 to the Sediments SOW or
11 as requested by EPA. EPA will make available to Respondent
12 validated data generated by EPA unless such data is exempt from
13 disclosure by any federal or state law or regulation.

14 42. Respondent shall verbally notify EPA at least fifteen
15 (15) days prior to conducting significant field events as described
16 in the Sediments SOW and the Monitoring Plan. At EPA's verbal or
17 written request, or the request of EPA's oversight assistant,
18 Respondent shall allow split or duplicate samples to be taken by
19 EPA (and its authorized representatives) of any samples collected
20 by Respondent in implementing this Consent Order. All split
21 samples of Respondent shall be analyzed by the methods identified
22 in the QAPjP.

23 43. At all reasonable times, EPA and its authorized
24 representatives shall have the authority to enter and freely move
25 about all property at the Smelter Site for the purposes of
26 inspecting conditions, activities, the results of activities,

1 records, operating logs, and contracts related to the Work at the
2 Site pursuant to this Consent Order; reviewing the progress of
3 Respondent in carrying out the terms of this Consent Order;
4 conducting tests as EPA or its authorized representatives deem
5 necessary; using a camera, sound recording device or other
6 documentary type equipment; and verifying the data submitted to EPA
7 by Respondent. Respondent shall allow these persons to inspect and
8 copy all non-privileged records, files, photographs, documents,
9 sampling and monitoring data, and other writings related to Work
10 undertaken in carrying out this Consent Order. Nothing herein
11 shall be interpreted as limiting or affecting EPA's right of entry
12 or inspection authority under federal law. All parties with access
13 to the Smelter Site under this Paragraph shall comply with all
14 approved health and safety plans.

15 44. Respondent may assert a claim of business confidentiality
16 covering part or all of the information submitted to EPA pursuant
17 to the terms of this Consent Order under 40 C.F.R. § 2.203,
18 provided such claim is allowed by section 104(e)(7) of CERCLA,
19 42 U.S.C. § 9604(e)(7). This claim shall be asserted in the manner
20 described by 40 C.F.R. § 2.203(b) and substantiated at the time the
21 claim is made. Information determined to be confidential by EPA
22 will be given the protection specified in 40 C.F.R. Part 2. If no
23 such claim accompanies the information when it is submitted to EPA,
24 the information may be made available to the public by EPA or the
25 State without further notice to Respondent. Respondent agrees not
26 to assert confidentiality claims with respect to any data related

1 to Site conditions, sampling, or monitoring.

2 45. In entering into this Consent Order, Respondent waives
3 any objections based on technical validity to any data gathered,
4 generated, or evaluated by EPA, the State or Respondent in the
5 performance or oversight of the Work that has been verified and
6 found to be technically valid according to the quality
7 assurance/quality control (QA/QC) procedures required by the
8 Consent Order or the Sediments SOW, EPA-approved Work Plans or
9 sampling and analysis plans, and the Monitoring Plan. If
10 Respondent objects to any other data relating to the Sediments SOW
11 or the Monitoring Plan, Respondent shall submit to EPA a report
12 that identifies and explains its objections, describes the
13 acceptable uses of the data, if any, and identifies any limitations
14 to the use of the data. The report must be submitted to EPA within
15 thirty (30) days of the monthly progress report containing the
16 data.

17 46. If the Site, or the off-Site area that is to be used for
18 access to perform the Sediments SOW or Monitoring Plan, is owned in
19 whole or in part by parties other than those bound by this Consent
20 Order, Respondent will obtain, or use its best efforts to obtain,
21 Site access agreements from the present owner(s) within ninety (90)
22 days from the effective date of this Consent Order. Such
23 agreements shall provide access for EPA, its contractors and
24 oversight officials, the State and its contractors, and Respondent
25 or its authorized representatives, and such agreements shall
26 specify that Respondent is not EPA's representative with respect to

1 liability associated with Site activities. Copies of such
2 agreements shall be provided to EPA prior to Respondent's
3 initiation of field activities. If access agreements are not
4 obtained within the time referenced above, Respondent shall
5 immediately notify EPA of its failure to obtain access. EPA may
6 obtain access for Respondent, perform those tasks or activities
7 with EPA contractors, or terminate the Consent Order in the event
8 that Respondent cannot obtain access agreements. In the event that
9 EPA performs those tasks or activities with EPA contractors and
10 does not terminate the Consent Order, Respondent shall perform all
11 other activities not requiring access to that Site, and shall
12 reimburse EPA for all costs incurred by EPA in performing its
13 activities. Respondent additionally shall integrate the results of
14 any such tasks undertaken by EPA into Respondent's reports and
15 deliverables. Furthermore, Respondent agrees to indemnify the U.S.
16 Government as specified in Section XXIV of this Consent Order.
17 Respondent also shall reimburse EPA for all costs and attorney fees
18 incurred by the United States to obtain access for Respondent
19 pursuant to this Paragraph.

20 XIV. DESIGNATED PROJECT COORDINATORS

21 47. Documents including reports, approvals, disapprovals, and
22 other correspondence which must be submitted under this Consent
23 Order, shall be sent by certified mail, return receipt requested,
24 to the following addressees or to any other addressees which
25 Respondent and EPA designate in writing:

26 (a) Four (4) copies of documents to be submitted to EPA shall

1 be sent to:

2 Ms. Piper L. Peterson
3 EPA Remedial Project Manager
4 U.S. EPA, Region 10 (HW-113)
5 1200 Sixth Avenue
6 Seattle, WA 98101

7 (b) Two (2) copies of documents to be submitted to the State
8 shall be sent to:

9 Bruce Cochran
10 Toxics Cleanup Program
11 Department of Ecology
12 P.O. Box 47600
13 Olympia, WA 98504-7600

14 (c) Two (2) copies of documents to be submitted to Respondent
15 should be sent to:

16 Thomas L. Aldrich
17 Site Manager
18 Tacoma Plant
19 ASARCO Incorporated
20 P.O. Box 1677
21 Tacoma, WA 98401

22 Michael Thorp
23 Heller, Ehrman, White & McAuliffe
24 1201 Pacific Avenue
25 Tacoma, WA 98402-4308

26 48. On or before the effective date of this Consent Order,
27 EPA and Respondent shall each designate their own Project
28 Coordinator. Each Project Coordinator shall be responsible for
overseeing the implementation of this Consent Order. To the
maximum extent possible, communications between Respondent and EPA
shall be directed to the Project Coordinator by mail, with copies
to such other persons as EPA, the State, and Respondent may
respectively designate. Communications include, but are not

1 limited to, all documents, reports, approvals, and other
2 correspondence submitted under this Consent Order.

3 49. EPA and Respondent each have the right to change their
4 respective Project Coordinator. The other party must be notified
5 in writing at least ten (10) days prior to the change.

6 50. EPA's Project Coordinator shall have the authority
7 lawfully vested in a Remedial Project Manager (RPM) and On-Scene
8 Coordinator (OSC) by the NCP. In addition, EPA's Project
9 Coordinator shall have the authority consistent with the National
10 Contingency Plan, to halt any Work required by this Consent Order,
11 and to take any necessary response action when s/he determines that
12 conditions at the Site may present an immediate endangerment to
13 public health or welfare or the environment. The absence of the
14 EPA Project Coordinator from the area under study pursuant to this
15 Consent Order shall not be cause for the stoppage or delay of Work.

16 51. EPA may arrange for a qualified person to assist in its
17 oversight and review of the conduct of the Sediments SOW and
18 Monitoring Plan, as required by section 104(a) of CERCLA, 42 U.S.C.
19 § 9604(a). The oversight assistant may observe the Work and make
20 inquiries in the absence of EPA, but is not authorized to modify
21 the Sediments SOW or the Monitoring Plan.

22 XV. OTHER APPLICABLE LAWS

23 52. Respondent shall comply with all laws that are applicable
24 when performing the Sediments SOW and Monitoring Plan. No local,
25 state, or federal permit shall be required for any portion of any
26 action conducted entirely on-Site, including studies, where such

1 action is selected and carried out in compliance with section 121
2 of CERCLA, 42 U.S.C. § 9621.

3 XVI. RECORD PRESERVATION

4 53. All records and documents created by Respondent, or on
5 Respondent's behalf, that relate in any way to the Work performed
6 at the Smelter Site or Sediments Unit under this Consent Order
7 shall be preserved during the conduct of this Consent Order and for
8 a minimum of ten (10) years after commencement of construction of
9 any remedial action. Respondent shall acquire and retain copies of
10 all such documents that relate to the Work under this Consent Order
11 and are in the possession of its employees, agents, accountants,
12 contractors, or attorneys. After this ten (10) year period,
13 Respondent shall notify EPA at least ninety (90) days before the
14 documents are scheduled to be destroyed. If EPA requests that the
15 documents be saved, Respondent shall give EPA the documents or
16 copies of the documents.

17 XVII. DISPUTE RESOLUTION

18 54. Any disputes concerning activities or deliverables
19 required under this Consent Order for which dispute resolution has
20 been expressly provided for, shall be resolved as follows: If
21 Respondent objects to any EPA notice of disapproval or requirement
22 made pursuant to this Consent Order, Respondent shall notify EPA's
23 Project Coordinator in writing of its objections within fifteen
24 (15) days of receipt of the disapproval notice or requirement.
25 Respondent's written objections shall define the dispute, state the
26 basis of Respondent's objections, and be sent certified mail,

1 return receipt requested. Except for deliverables subject to the
2 informal dispute resolution procedures set forth in Paragraph 28,
3 EPA and Respondent have an additional fifteen (15) days to reach
4 agreement. If an agreement is not reached within fifteen (15)
5 days, Respondent may request a determination by EPA's Region 10
6 Superfund Branch Chief. The request by Respondent shall include a
7 written statement of the dispute, state the basis of Respondent's
8 position on the matter in dispute, and include any data, analysis
9 or other materials supporting or defining Respondent's position.
10 If Respondent does not agree with the Branch Chief's decision,
11 within seven (7) days of receiving such decision in writing,
12 Respondent may request a final determination by the Director of the
13 Hazardous Waste Division, EPA Region 10.

14 55. The Division Director's determination is EPA's final
15 decision. Respondent shall proceed in accordance with EPA's final
16 decision regarding the matter in dispute, regardless of whether
17 Respondent agrees with the decision. If Respondent does not
18 perform the Work in accordance with EPA's final decision, EPA
19 reserves the right in its sole discretion to conduct the Work
20 itself, to seek reimbursement from Respondent, to seek enforcement
21 of the decision, to seek stipulated penalties, and/or to seek any
22 other appropriate relief. Respondent shall not seek judicial
23 review of the decision unless EPA brings an action to enforce
24 compliance with such decision, to recover a penalty, or to seek
25 reimbursement of EPA's costs regarding such decision.

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1 56. Respondent is not relieved of its obligations to perform
2 and conduct activities and submit deliverables on the schedule set
3 forth in this Consent Order, the Sediments SOW or the Monitoring
4 Plan while a matter is pending in dispute resolution. The
5 invocation of dispute resolution does not stay stipulated penalties
6 under this Consent Order.

7 XVIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES

8 57. For each day that Respondent fails to complete a
9 deliverable in a timely manner or fails to produce a deliverable of
10 acceptable quality, or otherwise fails to perform in accordance
11 with the requirements of this Consent Order, Respondent shall be
12 liable for stipulated penalties. Penalties begin to accrue on the
13 day that performance is due or a violation occurs, and extend
14 through the period of correction. Where a revised submission by
15 Respondent is required, stipulated penalties shall continue to
16 accrue and shall continue to accrue for thirty (30) days after the
17 due date of the resubmission after which date stipulated penalties
18 shall stop accruing unless and until EPA notifies Asarco that it
19 has modified or disapproved the resubmittal because it contains a
20 material defect, upon which date accrual of stipulated penalties
21 shall resume and shall continue to accrue through the final day of
22 the correction of the noncompliance or completion of the activity.
23 EPA will provide written notice for violations that are not based
24 on timeliness; nevertheless, penalties shall accrue from the day a
25 violation commences. Payment shall be due within thirty (30) days
26 of receipt of a demand letter from EPA.

1 58. Respondent shall pay interest on the unpaid balance of
2 any penalty, which shall begin to accrue at the end of the thirty
3 (30) day period, at the rate established by the Department of
4 Treasury pursuant to 30 U.S.C. § 3717.

5 59. Respondent shall make all payments by forwarding a check
6 to:

U.S. Environmental Protection Agency
Region 10 Superfund Accounting
P.O. Box 360903M
Pittsburgh, PA 15251

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8
9 Checks should identify the name of the Site, the Site
10 identification number, and the title of this Consent Order. A copy
11 of the check and/or transmittal letter shall be forwarded to the
12 EPA Project Coordinator. The Site identification number for the
13 Asarco smelter is 10W3 and for marine sediments is 10W4.

14 60. The following stipulated penalties shall be payable per
15 violation per day to the United States for the failure to submit
16 any deliverable in accordance with the schedule set forth in
17 Exhibit 1 to the Sediments SOW:

18	Penalty Per Violation Per Day	<u>Period of Noncompliance</u>
19	\$1,000	1st -- 14th day
20	\$5,000	15th -- 30th day
21	\$10,000	31st day and beyond.

22 61. The following stipulated penalties shall be payable per
23 violation per day to the United States for failure to submit timely
24 or adequate monthly progress reports, for failure to submit any
25 deliverable required by Paragraph 27(c) except
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1 subparagraph 27(c)(ii), for failure to submit any other reports or
2 written documents required by this Consent Order not identified in
3 Paragraph 60, or for the failure to perform any other requirement
4 under this Consent Order, except Section XXIV (Financial Assurance,
5 Insurance, and Indemnification):

6	Penalty Per Violation Per Day	<u>Period of Noncompliance</u>
7	\$300	1st -- 14th day
8	\$750	15th -- 30th day
9	\$2,500	31st day and beyond.

10 62. Respondent may dispute EPA's right to the stated amount
11 of penalties by invoking the dispute resolution procedures under
12 Section XVII herein. Penalties shall accrue but need not be paid
13 during the dispute resolution period. If Respondent does not
14 prevail upon resolution, all penalties shall be due to EPA within
15 thirty (30) days of resolution of the dispute. If Respondent
16 prevails upon dispute resolution, no penalties shall be paid.

17 63. In the event that EPA provides for corrections to be
18 reflected in the next deliverable and does not require resubmission
19 of that deliverable, stipulated penalties for that interim
20 deliverable shall cease to accrue on the date of such decision by
21 EPA.

22 64. The stipulated penalties provisions do not preclude EPA
23 from pursuing any other remedies or sanctions which are available
24 to EPA because of Respondent's failure to comply with this Consent
25 Order, including but not limited to conduct of all or part of the
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1 Sediments SOW and Monitoring Plan by EPA. Payment of stipulated
2 penalties does not alter Respondent's obligation to complete
3 performance under this Consent Order.

4 XIX. FORCE MAJEURE

5 65. "Force majeure", for purposes of this Consent Order, is
6 defined as any event arising from causes entirely beyond the
7 control of Respondent and of any entity controlled by Respondent,
8 including its contractors and subcontractors, that delays the
9 timely performance of any obligation under this Consent Order
10 notwithstanding Respondent's best efforts to avoid the delay. The
11 requirement that Respondent exercise "best efforts to avoid the
12 delay" includes using best efforts to anticipate any potential
13 force majeure event and best efforts to address the effects of any
14 potential force majeure event: (a) as it is occurring and (b)
15 following the potential force majeure event, such that the delay is
16 minimized to the greatest extent practicable. Examples of events
17 that are not force majeure events include, but are not limited to,
18 increased costs or expenses of any Work to be performed under this
19 Consent Order or the financial difficulty of Respondent to perform
20 such Work.

21 66. If any event occurs or has occurred that may delay the
22 performance of any obligation under this Consent Order, whether or
23 not caused by a force majeure event, Respondent shall notify by
24 telephone the EPA Remedial Project Manager or, in his or her
25 absence, the EPA Region 10 Superfund Branch Chief, within forty-
26 eight (48) hours of when Respondent knew or should have known that

1 the event might cause a delay. Within five business days
2 thereafter, Respondent shall provide in writing the reasons for the
3 delay; the anticipated duration of the delay; all actions taken or
4 to be taken to prevent or minimize the delay; a schedule for
5 implementation of any measures to be taken to mitigate the effect
6 of the delay; and a statement as to whether, in the opinion of
7 Respondent, such event may cause or contribute to an endangerment
8 to public health, welfare or the environment. Respondent shall
9 exercise best efforts to avoid or minimize any delay and any
10 effects of a delay. Failure to comply with the above requirements
11 shall preclude Respondent from asserting any claim of force
12 majeure.

13 67. If EPA agrees that the delay or anticipated delay is
14 attributable to force majeure, the time for performance of the
15 obligations under this Consent Order that are directly affected by
16 the force majeure event shall be extended by agreement of the
17 parties, pursuant to Section XXV of this Consent Order, for a
18 period of time not to exceed the actual duration of the delay
19 caused by the force majeure event. An extension of the time for
20 performance of the obligation directly affected by the force
21 majeure event shall not, of itself, extend the time for performance
22 of any subsequent obligation.

23 68. If EPA does not agree that the delay or anticipated delay
24 has been or will be caused by a force majeure event, or does not
25 agree with Respondent on the length of the extension, the issue
26 shall be subject to the dispute resolution procedures set forth in

1 Section XVII of this Consent Order. In any such proceeding, to
2 qualify for a force majeure defense, Respondent shall have the
3 burden of demonstrating by a preponderance of the evidence that the
4 delay or anticipated delay has been or will be caused by a force
5 majeure event, that the duration of the delay was or will be
6 warranted under the circumstances, that Respondent did exercise or
7 is exercising due diligence by using its best efforts to avoid and
8 mitigate the effects of the delay, and that Respondent complied
9 with the requirements of Paragraphs 65 and 66.

10 69. Should Respondent carry the burden set forth in
11 Paragraphs 65 and 66, the delay at issue shall be deemed not to be
12 a violation of the affected obligation of this Consent Order.

13 XX. REIMBURSEMENT OF RESPONSE AND OVERSIGHT COSTS

14 70. Following the issuance of this Consent Order, EPA may
15 submit to Respondent, on a periodic basis, an accounting of all
16 response costs including oversight costs incurred by the United
17 States with respect to the Sediments SOW and Monitoring Plan.
18 Response costs may include, but are not limited to, costs incurred
19 by the United States in overseeing Respondent's implementation of
20 the requirements of this Consent Order and activities performed by
21 the United States as part of the performance of the Sediments SOW
22 and Monitoring Plan, including any costs incurred while obtaining
23 access, and community relations activities. Costs shall include
24 all direct and indirect costs, including, but not limited to, time
25 and travel costs of EPA personnel and associated indirect costs,
26 contractor costs, cooperative agreement costs, compliance

1 monitoring, including the collection and analysis of split samples,
2 inspection of monitoring or sampling activities, Site visits,
3 discussions regarding disputes that may arise as a result of this
4 Consent Order, review and approval or disapproval of reports, and
5 costs of redoing any of Respondent's tasks.

6 71. EPA shall send Respondent an accounting requiring payment
7 that includes a Superfund Cost Organization Recovery Enhancement
8 System Report (SCORES Report). The SCORES Report will show direct
9 and indirect costs incurred by EPA and the Department of Justice
10 (DOJ) and their contractors. Respondent shall, within thirty (30)
11 days of receipt of each accounting, remit a certified or cashier's
12 check for the amount of those costs. Interest shall accrue from
13 the later of: the date payment of a specified amount is demanded in
14 writing; or the date of the expenditure. The interest rate is the
15 rate of interest on investments for the Hazardous Substances
16 Superfund in section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

17 72. Checks shall be made payable to the Hazardous Substances
18 Superfund and should include the name of the Site, the Site
19 identification number, and the title of this Consent Order. The
20 Site identification number for the Asarco smelter is 10W3 and for
21 marine sediments is 10W4. Checks should be forwarded to:

22 U.S. Environmental Protection Agency
23 Region 10 Superfund Accounting
24 P.O. Box 360903M
Pittsburgh, PA 15251

25 73. Copies of the transmittal letter and check shall be sent
26 simultaneously to the EPA Project Coordinator.

1 74. Respondent agrees to limit any disputes concerning costs
2 to accounting errors and the inclusion of costs outside the scope
3 of this Consent Order. Respondent shall identify any contested
4 costs and the basis of its objection. All undisputed costs shall
5 be remitted by Respondent in accordance with the schedule set forth
6 above. Disputed costs shall be paid by Respondent into an escrow
7 account while the dispute is pending. Respondent bears the burden
8 of establishing an EPA accounting error or the inclusion of costs
9 outside the scope of this Consent Order.

10 XXI. RESERVATIONS OF RIGHTS AND REIMBURSEMENT OF OTHER COSTS

11 75. EPA reserves the right to bring an action against
12 Respondent under section 107 of CERCLA, 42 U.S.C. § 9607, for
13 recovery of all response costs including oversight costs, incurred
14 by the United States at the Site that are not reimbursed by
15 Respondent, any costs incurred in the event that EPA performs the
16 Sediments SOW or Monitoring Plan or any part thereof, and any
17 future costs incurred by the United States in connection with
18 response activities conducted under CERCLA at the Site. Respondent
19 reserves the right to seek allocation of response costs between it
20 and other potentially responsible parties.

21 76. EPA reserves the right to bring an action against
22 Respondent to enforce the response and oversight cost reimbursement
23 requirements of this Consent Order, to collect stipulated penalties
24 assessed pursuant to section XVIII of this Consent Order, and to
25 seek penalties pursuant to section 109 of CERCLA, 42 U.S.C. § 9609.
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27

1 77. Except as expressly provided in this Order, each party
2 reserves all rights and defenses it may have. Nothing in this
3 Consent Order shall affect EPA's removal authority or EPA's
4 response or enforcement authorities including, but not limited to,
5 the right to seek injunctive relief, stipulated penalties,
6 statutory penalties, and/or punitive damages.

7 78. Following satisfaction of the requirements of this
8 Consent Order, Respondent shall have resolved its liability to EPA
9 for the Work performed by Respondent pursuant to this Consent
10 Order. Respondent is not released from liability, if any, for any
11 response actions taken beyond the scope of this Consent Order
12 regarding removals, other operable units, remedial design/remedial
13 action of these operable units, or activities arising pursuant to
14 section 121(c) of CERCLA, 42 U.S.C. § 9621(c).

15 XXII. DISCLAIMER

16 79. By signing this Consent Order and taking actions under
17 this Consent Order, Respondent does not necessarily agree with
18 EPA's Findings of Fact and Conclusions of Law. Furthermore, the
19 participation of Respondent in this Consent Order shall not be
20 considered an admission of liability and is not admissible in
21 evidence against Respondent in any judicial or administrative
22 proceeding other than a proceeding by the United States, including
23 EPA, to enforce this Consent Order or a judgment relating to it.
24 Respondent retains its rights to assert claims against other
25 potentially responsible parties at the Site. However, Respondent
26 agrees not to contest the validity or terms of this Consent Order,

1 or the procedures underlying or relating to the Consent Order, in
2 any action brought by the United States, including EPA, to enforce
3 its terms.

4 XXIII. OTHER CLAIMS

5 80. In entering into this Consent Order, Respondent waives
6 any right to seek reimbursement under section 106(b) of CERCLA, 42
7 U.S.C. § 9606(b). Respondent also waives any right to present a
8 claim under sections 111 or 112 of CERCLA, 42 U.S.C. §§ 9611 or
9 9612. This Consent Order does not constitute any decision on
10 preauthorization of funds under section 111(a)(2) of CERCLA, 42
11 U.S.C. § 9611(a)(2). Respondent further waives all other statutory
12 and common law claims against EPA, including, but not limited to,
13 contribution and counterclaims, relating to or arising out of
14 conduct of the Sediments SOW and Monitoring Plan.

15 81. Nothing in this Consent Order shall constitute or be
16 construed as a release from any claim, cause of action or demand in
17 law or equity against any person, firm, partnership, subsidiary or
18 corporation not a signatory to this Consent Order for any liability
19 it may have arising out of or relating in any way to the
20 generation, storage, treatment, handling, transportation, release,
21 or disposal of any hazardous substances, pollutants, or
22 contaminants found at, taken to, or taken from the Site.

23 82. Respondent shall bear its own costs and attorneys fees.

24 XXIV. FINANCIAL ASSURANCE, INSURANCE, AND INDEMNIFICATION

25 83. Respondent shall submit to EPA an estimate of the cost of
26 the Work to be performed in the upcoming year within sixty (60)

1 days of the effective date of this Consent Order. Respondent shall
2 submit a new estimate each year within sixty (60) days of the
3 annual anniversary of the effective date of this Consent Order.
4 Together with its submission each year of the estimate of the cost
5 of the Work, Respondent shall also establish and maintain financial
6 security in an amount corresponding to the estimate of the Work to
7 be performed in the upcoming year in one of the following forms:

- 8 (a) A surety bond guaranteeing performance of the Work;
- 9 (b) One or more irrevocable letters of credit equalling
10 the annual estimated cost of the Work;
- 11 (c) A trust fund;
- 12 (d) A guarantee to perform the Work by one or more
13 parent corporations or subsidiaries, or by one or
14 more unrelated corporations that have a substantial
15 business relationship with Respondent; or
- 16 (e) A demonstration that Respondent satisfies the
17 requirements of 40 C.F.R. Part 264.143(f) or the
18 requirements of Appendix III (Criteria for
19 Financial Assurance).

20 84. If Respondent seeks to demonstrate the ability to
21 complete the Work through a guarantee by a third party pursuant to
22 Paragraph 83(d) of this Consent Order, Respondent shall demonstrate
23 that the guarantor satisfies the requirements of 40 C.F.R.
24 Part 264.143(f). If Respondent seeks to demonstrate its ability to
25 complete the Work by means of the financial test or the corporate
26 guarantee pursuant to Paragraph 83(d) or (e), it shall resubmit
27 sworn statements conveying the information required by 40 C.F.R.
28 Part 264.143(f) annually, on the anniversary of the effective date
of this Consent Order. In the event that EPA determines at any

1 time that the financial assurances provided pursuant to this
2 Section are inadequate, Respondent shall, within thirty (30) days
3 of receipt of notice of EPA's determination, obtain and present to
4 EPA for approval one of the other forms of financial assurance
5 listed in Paragraph 83 of this Consent Order. Any determination of
6 inadequacy of Respondent's financial assurances shall be subject to
7 dispute resolution pursuant to Section XVII (Dispute Resolution).
8 Respondent's inability to demonstrate financial ability to complete
9 the Work shall not excuse performance of any activities required
10 under this Consent Order.

11 85. (a) Prior to commencement of any Work under this Consent
12 Order, Respondent shall secure, and shall maintain in force for the
13 duration of this Consent Order, and for two years after the
14 completion of all activities required by this Consent Order,
15 Comprehensive General Liability ("CGL") and automobile insurance,
16 naming as an additional insured the United States. The CGL
17 insurance shall include Contractual Liability Insurance in the
18 amount of one million (\$1,000,000) per occurrence, and Umbrella
19 Liability Insurance in the amount of two million (\$2,000,000) per
20 occurrence.

21 (b) For the duration of this Consent Order, Respondent
22 shall satisfy, or shall ensure that its contractors and
23 subcontractors satisfy, all applicable laws and regulations
24 regarding the provision of employer's liability insurance and
25 workmen's compensation insurance for all persons performing work on
26 behalf of Respondent, in furtherance of this Consent Order.

1 (c) If Respondent demonstrates by evidence satisfactory
2 to EPA that any contractor or subcontractor maintains insurance
3 equivalent to that described above, or insurance covering the same
4 risks but in a lesser amount, then with respect to that contractor
5 or subcontractor Respondent need provide only that portion of the
6 insurance described above which is not maintained by the contractor
7 or subcontractor.

8 (d) Prior to commencement of any Work under this
9 Consent Order, and annually thereafter on the anniversary of the
10 effective date of this Consent Order, Respondent shall provide to
11 EPA certificates of such insurance and a copy of each insurance
12 policy.

13 86. At least seven (7) days prior to commencing any Work
14 under this Consent Order, Respondent shall certify to EPA that the
15 required insurance has been obtained by that contractor.

16 87. Respondent agrees to indemnify and hold the United States
17 Government, its agencies, departments, agents, and employees
18 harmless from any and all claims or causes of action arising from
19 or on account of acts or omissions of Respondent, its employees,
20 agents, servants, receivers, successors, or assignees, or any
21 persons including, but not limited to, firms, corporations,
22 subsidiaries and contractors, in carrying out activities under this
23 Consent Order. The United States Government or any agency or
24 authorized representative thereof shall not be held as a party to
25 any contract entered into by Respondent in carrying out activities
26 under this Consent Order.

1 XXV. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

2 88. The effective date of this Consent Order shall be the
3 date it is signed by EPA.

4 89. This Consent Order may be amended by mutual agreement of
5 EPA and Respondent. Amendments shall be in writing and shall be
6 effective when signed by EPA. EPA Project Coordinators do not have
7 the authority to sign amendments to the Consent Order.

8 90. No informal advice, guidance, suggestions, or comments by
9 EPA regarding reports, plans, specifications, schedules, and any
10 other writing submitted by Respondent will be construed as
11 relieving Respondent of its obligation to obtain such formal
12 approval as may be required by this Consent Order. Any
13 deliverables, plans, technical memoranda, reports (other than
14 progress reports), specifications, schedules and attachments
15 required by this Consent Order are, upon approval by EPA,
16 incorporated into this Consent Order.

17 XXVI. TERMINATION AND SATISFACTION

18 91. This Consent Order shall terminate when Respondent
19 demonstrates in writing and certifies to the satisfaction of EPA
20 that all activities required under this Consent Order, including
21 any additional Work, response and oversight costs, and any
22 stipulated penalties demanded by EPA, have been performed and EPA
23 has approved the certification. This notice shall not, however,
24 terminate Respondent's obligation to comply with Sections XVI
25 (Record Preservation), XX (Reimbursement of Response and Oversight
26 Costs) and XXI (Reservations of Rights and Reimbursement of Other
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Costs) of this Consent Order.

92. The certification shall be signed by a responsible official representing Respondent. The representative shall make the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate, and complete." For purposes of this Consent Order, a responsible official is a corporate official who is in charge of a principal business function.

BY: M. J. Mann Vice President DATE: 10/3/94
(Respondent) Title

BY: Carol Rushin DATE: 10/4/94
Carol Rushin
EPA Region 10 Superfund Branch Chief
U.S. Environmental Protection Agency